RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100273 SEPARATION DATE: 20050725

BOARD DATE: 20120320

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Army, Specialist/E-4, (92S/Shower/Laundry & Clothing Repair Specialist) medically separated for chronic radiating low back pain. Despite conservative treatment, he did not respond adequately to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Pain with L4-5, right broad disk protrusion was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions appeared on the MEB’s submission. Other conditions included in the Disability Evaluation System (DES) file will be discussed below. The PEB adjudicated the chronic radiating low back pain condition as unfitting, rated 10% with application of the US Army Physical Disability Agency (USAPDA) pain policy. The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: “I Injured [sic] my back in Iraq in May of 2004. I was kept in country until late September. I asked to be sent to Germany to take tests but was denied. When I came back to Hawaii I went to Tripler Army Medical Center. The doctor told me I had protrusions on my L4 and L5 lumbar. I was kept in the rear and began treatment. When the treatment did not work I began my medical discharge. I was given a rating of ten percent by the Army. My back has been an ongoing problem that has caused me pain and the loss of employment. I no longer can get a labor intensive job because cannot perform the tasks. I was employed with the U.S. Postal Service but had to quit after the pain in my back became almost constant. The rating for the VA is based on flexibility and movement. My range of motion has decreased but has not become a situation that would require surgery. Because of this I find myself in a state of daily pain varying from 5 to 8 and up to 10 on really bad days. I am not asking for something for free. I joined the Army to serve my country in what I felt was a time of need now I simply ask that my country take care of me in my time of need.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

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| **Service IPEB – Dated 20050525** | **VA (1 Mo. After Separation) – All Effective Date 20050728** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Radiating LBP | 5243 | 10% | Lumbosacral Strain | 5237 | 40% | 20050825 |
| ↓No Additional MEB/PEB Entries↓ | Right Knee Strain | 5260 | 10% | 20050825 |
| 0% x 0/Not Service Connected x 0 | 20050825 |
| **Combined: 10%** | **Combined: 50%** |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that there should be additional disability assigned for the gravity of his condition and predictable consequences which merit consideration for a higher separation rating. The DES considers those medical conditions that cut short a service member's career, but only to the degree of severity present at the time of final separation. However, the Department of Veterans’ Affairs, operating under a different set of laws (Title 38, United States Code), is empowered to periodically re-evaluate veterans for the purpose of adjusting the disability rating should the degree of impairment vary over time.

Low Back Condition. The CI’s initial injury occurred while deployed to Iraq in May 2004. He was changing the tire on a light medium tactical vehicle that was disabled by an improvised explosive device blast when he developed acute low back pain. The CI sought treatment while in theater and continued conservative care with medications, physical therapy, chiropractic, and injections upon his return to the states. A lumbar computed tomography scan performed on 14 September 2004 did show a broad based disc protrusion at L4-5 that caused bilateral neuroforaminal narrowing and contacted the right L5 nerve root. He remained unable to perform within his MOS or meet physical fitness standards, was issued a permanent L3 profile and underwent a MEB. There were two goniometric range of motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation. Both of these exams are summarized in the chart below. The MEB exam documented three measurements for each ROM, as noted in the chart. Board precedent, IAW VASRD §4.71a and congruent with VA rating practice, is to round to the nearest five degrees and to utilize the lowest of multiple measurements for rating purposes.

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| Goniometric ROM - Thoracolumbar | MEB ~ 3 Months Pre-Sep(20050503) | VA C&P ~ 1 Month After-Sep(20050825) |
| Flex (0-90) | 30° (35⁰, 37⁰, 28⁰)  | 40° (25⁰ after repetition)  |
| Ext (0-30) | 10° (14⁰, 19⁰, 10⁰)  | 15° (20⁰ after repetition) |
| R Lat Flex (0-30) | 20° (26⁰, 22⁰, 24⁰)  | 15° (15⁰ after repetition) |
| L Lat Flex 0-30) | 15° (20⁰, 16⁰, 15⁰)  | 20° (15⁰ after repetition) |
| R Rotation (0-30) | 25° (23⁰, 30⁰, 32⁰)  | 25° (30⁰ after repetition) |
| L Rotation (0-30) | 25° (24⁰, 31⁰, 31⁰)  | 30° (30⁰ after repetition) |
| COMBINED (240) | 125° | 145⁰ (135⁰ after repetition) |
| Comment | Motion is pain limitedSpasm; no comment on neurologic exam, spinal contour, or gait; 10% assigned—Pain Rule | 40% for flexion ≤30⁰ with repetition-- DeLucaNormal gait; upright posture |
| §4.71a Rating | 40% (Flexion ≤30⁰) | 40% (Flexion ≤30⁰ with DeLuca) |

The narrative summary (NARSUM) on 12 May 2005, two months prior to separation, noted decreased ROM due to pain, paraspinal muscle spasms and slight tenderness of the lumbosacral spine. The actual ROM measurements were made on 3 May 2005, approximately three months prior to separation. Three repetitions were performed with flexion decreased from 35 degrees to 28 degrees on the third evaluation. All Waddell’s were negative. Although the review of symptoms noted right-sided radiating pain, with numbness and tingling, no neurological exam was noted. The VA Compensation and Pension (C&P) examination on 25 August 2005, one month after separation, documented limited ROM, with flexion decreasing from 41 degrees to 26 degrees with repetitive use. Interestingly, motion in some planes was improved with repetition with fairly consistent findings on the two evaluations. The CI did report a history of occasional radiation of pain and numbness in the right leg with prolonged walking. Extremity and neurologic examinations were normal, with normal gait and no spasm or tenderness. Neither evaluation reports physical findings of radiculopathy or ratable peripheral nerve impairment due to motor or sensory deficits and neither document incapacitating episodes of low back pain. The commander’s statement on 5 May 2005 mentions only his low back condition as clearly unfitting and recommends separation.

The PEB on 25 May 2005 adjudicated the chronic radiating low back pain condition as unfitting, rated 10%, coded 5243 (intervertebral disc syndrome) with application of the USAPDA pain policy. The PEB noted that there were no clinical signs of radiculopathy; however, the low back condition did prevent him from performing training and duties in his primary MOS. The VA Rating Decision on 10 January 2006, five months after separation, service-connected the lumbosacral strain condition, code 5237 (lumbosacral strain), with a 40% rating. The VA rationale noted that he did have flexion of less than 30 degrees with repetition, which is consistent with a 40% rating. In *DeLuca v. Brown* (1995), the United States Court of Appeals for Veterans Claims ruled that the VA must separately consider any additional functional loss due to pain, flare-ups, deformity, tenderness, arthritis, loss of motion on repetitive use, weakened movement, excess fatigability or incoordination when rating disabilities. His ROM demonstrated flexion of 30 degrees or less after repetition, providing the VA rationale for the 40% rating IAW VASRD §4.45 and §4.71a.

The PEB and VA chose different coding options for the condition, but this does not bear on rating since both refer to the general rating formula for diseases and injuries of the spine and there are no incapacitating episodes that would allow alternate rating under code 5243. Under the general rating formula, a 20% rating requires forward flexion of the thoracolumbar spine greater than 30 degrees, but not greater than 60 degrees; or the combined ROM of the thoracolumbar spine not greater than 120 degrees; or muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis. A 40% rating requires forward flexion of the thoracolumbar spine 30 degrees or less or favorable ankylosis of the entire thoracolumbar spine. The MEB and VA examinations are consistent in reporting similar loss of motion with repetition for thoracolumbar flexion and are considered by the Board to have equal probative value. As noted above, the VA rating of 40% with application of the §4.45 (DeLuca) criteria is supported by the flexion of 25 degrees. The MEB flexion of 28 (rounded to 30) degrees would also support a 40% rating. For both evaluations the combined motion of greater than 120 degrees but not greater than 235 degrees, with spasm and tenderness that does not result in abnormality of spinal contour or gait supports the 10% rating criteria. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt) and §4.45 (DeLuca), the Board, by simple majority, recommends a rating of 40%, code 5243, for the chronic radiating low back pain condition IAW VASRD §4.71a.

Remaining Conditions. Other conditions identified in the DES file were right knee injury and hyperlipidemia. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically active during the MEB period, none carried attached profiles, and none were implicated in the commander’s statement. These conditions were reviewed by the action officer and considered by the Board. It was determined that none could be argued as unfitting and subject to separation rating. No other conditions were service-connected with a compensable rating by the VA within 12 months of separation or contended by the CI. The Board therefore has no reasonable basis for recommending any additional unfitting conditions for separation rating.

BOARD FINDINGS: IAW DoDI 6040.44, provisions of DoD or Military Department regulations or guidelines relied upon by the PEB will not be considered by the Board to the extent they were inconsistent with the VASRD in effect at the time of the adjudication. As discussed above, PEB reliance on the USAPDA pain policy for rating the chronic radiating low back pain condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the chronic low back pain condition, the Board, by simple majority, recommends a rating of 40% coded 5243, IAW VASRD §4.71a. The single voter for dissent (who recommended a rating of 20% coded 5243) did elect to submit a minority opinion. In the matter of the right knee injury, hyperlipidemia or any other medical conditions eligible for Board consideration, the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows and that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of his prior medical separation:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Degenerative Disc Disease  | 5243 | 40% |
| **COMBINED** | **40%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294 dated 20110407, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

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 President Physical Disability Board of Review

Minority Opinion:

Using the preponderance of evidence outlined in the ROP, a rating of 20%, coded 5243, is appropriate for the adjudication of this case. The majority of the Board members voted 40% based on a single ROM measurement of 28 degrees, rounded to the nearest five degrees as identified in VASRD §4.71a, Note (4). The action officer also notes in the ROP: “congruent with VA rating practice, is to round to the nearest five degrees and to utilize the lowest of multiple measurements for rating purposes.” While the rounding is correct, there is no mention in any of the six notes in VASRD §4.71a that utilization of the lowest of multiple measurements should be used for rating purposes.

The ROMs cited in the record of proceedings indicate that the CI, on multiple attempts, during the MEB and VA C&P exams, clearly had a flexion of greater than 30 degrees. On the MEB, they are identified as 35 and 37 degrees, respectively; and on the VA C&P exam, he had flexion of 40 degrees. DeLuca, notwithstanding, there is clear evidence of an ability to flex greater that 30 degrees. There are few other ROM measurements in the service treatment record, but no clinical note records motion as restricted as these exams. One clinical note indicates full active ROM but painful in all directions, while another clinical entry noted forward flexion greater than 50% (45 degrees). Both the MEB and VA exams document ROM limited by pain without noting a range of ROM in which pain was present, suggesting that ROM was measured to the onset of pain. This calls the validity of these exams with respect to VASRD standards into question. Additionally, the CI passed two diagnostic physical fitness tests, one in April 2004 and another in June 2004 where he did 57 and 45 sit-ups, respectively. A “go” sit-up requires an individual to go from the prone position to almost 90 degrees of flexion. He was not assigned a permanent L3 profile until March 2005, and was on a series of temporary L3 profiles from June 2004, after he passed the second diagnostic physical fitness test. As the CI was not working in his primary MOS (92S), but rather in the 25th ID Tax Center, where, according to his commander’s statement, “allows him to take breaks when needed and still be utilized,” he was not aggravating his back condition or participating in Soldier skills that would exacerbate his condition.

In assigning probative value to these somewhat conflicting data, the dissenting Board member notes that: (1) neither the more restricted MEB nor VA measurements are consistent with corroborating evidence; (2) neither the more restricted MEB nor VA measurements are consistent with the other collateral physical findings (normal gait, no spasm on VA exam); (3) in cases with similar pathology and diagnostic evidence, Board action officers have opined that similar severely restricted ROM was not consistent with the clinical pathology in evidence; (4) there is not a reasonable accounting for markedly worsened practical ROM demonstrated by the CI in the fairly short interval between the physical fitness tests and the MEB and VA examinations; and (5) disability rating evaluations based on ROM rely on subjective pain thresholds which are patently associated with financial incentive, thus inherently subject to some loss of objectivity. Therefore, based on all evidence and associated conclusions just elaborated, the dissenting Board member believes that preponderant probative value to the less restricted ROMs in both the MEB and VA evaluations, which are consistent with a 20% rating.

I respectfully submit that the Secretary consider a minority recommendation that the permanent rating for the degenerative disc disease be 20%, coded 5243.

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

(TAPD-ZB /), 2900 Crystal Drive, Suite 300, Arlington, VA 22202

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for XXXXXXXXX, AR20120006161 (PD201100273)

1. Under the authority of Title 10, United States Code, section 1554(a), I approve the enclosed recommendation of the Department of Defense Physical Disability Board of Review (DoD PDBR) pertaining to the individual named in the subject line above to recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 40% effective the date of the individual’s original medical separation for disability with severance pay.

2. I direct that all the Department of the Army records of the individual concerned be corrected accordingly no later than 120 days from the date of this memorandum:

 a. Providing a correction to the individual’s separation document showing that the individual was separated by reason of permanent disability retirement effective the date of the original medical separation for disability with severance pay.

 b. Providing orders showing that the individual was retired with permanent disability effective the date of the original medical separation for disability with severance pay.

 c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 40% effective the date of the original medical separation for disability with severance pay.

 d. Affording the individual the opportunity to elect Survivor Benefit Plan (SBP) and medical TRICARE retiree options.

3. I request that a copy of the corrections and any related correspondence be provided to the individual concerned, counsel (if any), any Members of Congress who have shown interest, and to the Army Review Boards Agency with a copy of this memorandum without enclosures.

BY ORDER OF THE SECRETARY OF THE ARMY:

Encl XXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA